LOW FONG MEI & ANOR.

v.

KO TECK SIANG & ORS.

HIGH COURT, SINGAPORE
LP THEAN J
[CONSOLIDATED ACTIONS, SUIT NOS. 1613 OF 1983,
422 OF 1986 & 296 OF 1987]
4 MAY 1989

TRUSTS: *Secret trust - Construction of trust deed - Whether execution of the deed released the executors and trustees from all actions - Knowledge of parties executing the trust deed - Equitable intervention - Duty of disclosure by trustees.*

One Ko Tech Kin made a will and appointed his wife and brother to be the executors and trustees of the will. By his will, he made various bequests mainly shares in various companies to his children and other relatives (this is found in Clause 12 of the said will). Probate was granted to the 2 executors but disputes erupted between them and all those concerned in the will. Fortunately, parties came to a settlement whereby a deed of family arrangement was made. A Court order was obtained for the said deed to be enforced.

On 8 April 1983, the 1st plaintiff being wife of one of the beneficiaries and co-administratrix for her late husband's estates, commenced 3 actions against the defendants for specific sums of money alleged to be due from defendants respectively to her late husband's estate. The defendants filed an application to strike out the plaintiffs' statement of claim and the learned Senior Assistant Registrar allowed the application. The plaintiffs being dissatisfied appealed against the decision.

To the claims of all the plaintiffs' actions, the defendants put up one common defence, that is, all outstanding matters and disputes in relation to the estate and administration thereof had been finally settled by the deed of family arrangement executed by all the parties including the 1st plaintiff, as the administratrix, to her late husband's estate. Clause 13 and 14 of the deed had released the executors and trustees of the estate from all actions and also the deed had confirmed that they had no other claim whatsoever against the 2 executors in their personal capacities.

In reply, the plaintiffs' Counsel alleged firstly that the plaintiff was not aware of the trust under which the shares in the various companies were held by the registered holders as she was not a party to the negotiations which led to the execution of the deed. Further she executed the deed as the co-administratrix to her late husband's estate. She therefore could not have intended to discharge the executors of the estate or any other party from any claim the estate of her late husband might have in respect of the secret trust.

Secondly, the executors were aware of the secret trust. However, not only did they not disclose to her the secret trust but there were side arrangement by the executors to give effect to the secret trusts. These were evidenced by various documents produced by the plaintiffs. In view thereof, the question here is whether the claims made by the plaintiffs fall within the scope of Clauses 13 and 14 of the deed.

Held:

[1] The question whether the plaintiffs' claim fall within the scope of Clause 13 and 14 of the deed, turns on (i) the facts alleged and relied upon by the plaintiffs in support of their claims and (ii) the true construction of these provisions. Here, the Court agreed that subject matter of the claims in plaintiff's three actions are not covered by the deed on the basis of the facts alleged and on the true construction of the deed as contended. The 1st plaintiff is not claiming the entitlement of the estate of her late husband to the shares in the various companies held by the testator at the date of his death. Those shares, they accept, had been got in and distributed pursuant to Clause 12 of the will. What they are claiming is the entitlement of the estate of 1st plaintiff's late husband to the shares in the various companies held by the defendants in trust for the testator. In another word, the deed at that time had been executed and it was valid, and the 1st plaintiff was bound by it.

[2] Further, the release as contained in the deed should not be construed to apply to circumstances of which a party executing it was ignorant at the time. If it turns out that on construction the terms of the release are more extensive than intended, equity will intervene and confine the terms to that which was intended or contemplated by the parties. In addition, there is a duty of disclosure by the trustees, and the executors of the estate, in breach of such duty, had never made any disclosure to the 1st plaintiff of the secret trusts of the shares in the various companies. It is difficult to say that the 1st plaintiff when signing the deed contemplated that there might be other causes of action which she did not know about and was "content to bargain to close her eyes" to those causes of action. Lastly there is nothing in Clause 13 and 14 of the deed to suggest that it covers all action claims or causes of action "whether disclosed or not."

[Appeals allowed.]

Cases referred to:

Lyall & Anor. v. Edwards and Matthie 6 H & N 336 [158 ER 139]
Turner v. Turner [1880] 14 Ch D 829
Grant v. John Grant & Sons Pty. Ltd. [1964] The Argus LR 517
Ramsden v. Hylton 2 Ves Sen 304 (28 ER 196)
Lindo v. Lindo 1 Beav 498 (48 ER 1032)
Payler & Ors. v. Homersham 4 M & S 423 (105 ER 890)
Cole v. Gibson 1 Ves Sen 504 (27 ER 1169)
Nautamix B.V. v. Jenkins of Retford Limited [1975] FSR 385
Wenlock v. Moloney & Ors. [1965] 2 All ER 871

For the plaintiff - Jules Sher QC (Kelvin Chia with him), Suit No. 1613 of 1983, Suit No. 422 of 1986 & Suit No. 296 of 1987
For the 1st defendant - Leolin Price QC (Tang Liang Hong and Siaw Kheng Boon with him), Suit No. 1613 of 1983, Suit No. 422 of 1986 & Suit No. 296 of 1987
For the 2nd defendant - Tay Beng Chai, Suit No. 422 of 1986 & Suit No. 296 of 1987
For the 3rd defendant - in person, Suit No. 422 of 1986 & Suit No. 296 of 1987

JUDGMENT

LP Thean J:

There are altogether six appeals before me: two appeals by the plaintiff against two orders respectively of the Assistant Registrar made on 26 January 1988 in Suit No. 422 of 1986 in which he struck out to the statement of claim of the plaintiff and dismissed the action against the 1st defendant and the 2nd defendant respectively; three appeals by the plaintiffs against

three orders respectively of the same Assistant Registrar made also on 26 January 1988 in Suit No. 296 of 1987 in which he struck out the statement of claim of the plaintiffs and dismissed the action against the 1st defendant, 2nd defendant and 3rd defendant respectively, and one appeal by the 1st defendant against an order of another Assistant Registrar made on 24 August 1988 in Suit No. 1613 of 1983, in which, amongst other things, he dismissed an application by the 1st defendant to strike out the plaintiff's statement of claim and for dismissal of the action against him. All these appeals raised the same issues and were therefore heard together. The circumstances that gave rise to these appeals are rather complex, and it is necessary to set them out in some detail.

I propose to start with an event that happened more than 20 years ago. On 9 April 1966 a prominent wealthy man by the name Ko Teck Kin, aged 55, died. His death was not unexpected, as he had been suffering from a terminal illness for some time. Just 10 days before his death, that is, on 30 March 1966, Ko Tech Kin ("the testator") made a will ("the will") and appointed his wife, Chang Jih Hao ("Madam Chang"), and his younger brother, Ko Teck Siang ("Teck Siang"), to be the executors and trustees of the will. Probate of the will was granted to Madam Chang and Teck Siang on 7 October 1966 and was issued on 5 April 1967. By his will, the testator made various bequests to his children and others , and the provisions which are material in these proceedings are found in Clause 12 which reads as follows:

> I give and bequeath to my trustees all my shares and interest in the following companies namely Ho Chiang Shipping Co. Ltd., Ko Rubber Plantation Ltd., Kah Hin Rubber Co. Ltd., Chin Cheng Realty Ltd. all of Singapore, and Sun Hin Realty Ltd. of Hong Kong, to hold upon trust to divide the said shares and interest into 210 equal shares and hold each 210th share upon the following trusts:
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> (a) As to 50/210th equal shares for the said Chang Jih Hao.
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> (b) As to 10/210th equal shares for Ko Oon Hin.
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> (c) As to 20/210th equal shares for Ko Oon Kay.
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> (d) As to 20/210th equal shares for Ko Oon Soon.
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> (e) As to 15/210th equal shares for Chan Yen Cheng.
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> (f) As to 30/210th equal shares for the said Ko Teck Siang.
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> (g) As to 22/210th equal shares for Ko Seng Gie.
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> (h) As to 20/210th equal shares for Ko Teck Djie
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> (i) As to 15/210th equal shares for Ko Hong Kiat
>
> (j) As to 3/210th equal shares for Ko Choon Huat.
>
> (k) As to 1/210th equal shares for Ko Oon Sin
>
> (l) As to 1/210th equal shares for Ko Oon Hian, and
>
> (m) As to 3/210th equal shares for Ko Seng Hock.

It is common ground that the beneficiaries listed in items (a) to (e) of Clause 12 are members of the immediate family of the testator (collectively called "class A beneficiaries"), and the total number of shares bequeathed to them amounts to 115, and those beneficiaries in items (f) to (m) are his collateral relatives (collectively called "class B beneficiaries") and the total number of shares bequeathed to them amounts to 95.

One of the legatees was Ko Oon Kay ("Oon Kay"), who was the son of the testator by his other widow, Madam Chan Yen Cheng. Oon Kay died on 4 March 1971 leaving his surviving widow, Low Fong Mei, and one daughter, Ko Lee Lian. Letters of administration to his estate were granted to Low Fong Mei and Ko Oon Soon ("Oon Soon"). Oon Soon is also the son of the testator by Madam Chan Yen Cheng. Low Fong Mei has since remarried and is now known as Mrs. Shirley Wang ("Shirley Wang").

Some ten years after the death of the testator, disputes between Madam Chang and Teck Siang erupted, and these disputes generated a plethora of litigations. Within a period of less than one month, between 28 August and 24 September 1979, two originating summonses and ten suits were instituted in the High Court. First, by Originating Summons No. 325 of 1979, Madam Chang claimed against Teck Siang for an order under s. 55 of the Trustees Act to vest in her certain shares in 4 companies, namely Ho Chiang Co. (Pte.) Ltd. ("Ho Chiang"). Ko Rubber Plantations (Pte.) Ltd. ("Ko Rubber"), Kah Min Rubber Company (Pte.) Ltd. ("Kah Min") and Chin Cheng Realty (Pte.) Ltd. ("Chin Cheng"), and also for an account and an order for administration of the estate of Ko Teck Kin deceased ("the estate") and other consequential reliefs. Less than three weeks thereafter, Teck Siang, as the executor and trustee of the estate, took out an application in Originating Summons No. 359 of 1979 against Madam Chang as the executrix of the estate, and he joined in those proceedings all the other, legatees of the bequest under Clause 12 of the will, and he sought a determination of the construction of Clauses 12 and 13 of the will. On the same day or immediately thereafter, Teck Siang caused or procured three writs of summons to be taken out in Suits Nos. 2764, 2765 and 2820 of 1979 respectively, in which Ho Chiang, Kah Hin and Ko Rubber respectively sued Madam Chang as the executrix of the estate for recovery of debts alleged to be due to them respectively, and in all these three actions, Teck Siang, as the executor and trustee of the estate, was joined as, a plaintiff. In addition, Ko Rubber (no doubt at the instance of Teck Siang) also took out a writ in Suit No. 2821 of 1979 against Madam Chang personally for recovery of a debt alleged to be due to the company. At or about the same time, Teck Siang, as the executor and trustee of the estate, took out two writs against Madam Chang both in her personal capacity and - as the executrix of the estate in Suits Nos. 2776 and 2777 of 1979 claiming respectively for an order for specific performance of various oral agreements alleged to have been made between them relating to the administration of the estate and for a debt alleged to be due to him. In response, Madam Chang took out four writs against Teck Siang in Suits Nos. 2852, 2853, 2854 and 2855 of 1979, claiming an injunction to restrain Teck Siang, until the administration of the estate is completed, from enforcing payment of any debts due to Chin Cheng, Ko Rubber, Kah Hin and Ho Chiang respectively.

Fortunately, the parties to those proceedings came to a settlement, and an instrument called the deed of family arrangement was made on 2 February 1981. On the following day, the parties appeared before the High Court and obtained an order by consent in Originating Summons No. 359 of 1979 to the effect that all further proceedings in the originating summons be stayed, except for the purpose of carrying into effect the terms of the deed of family arrangement. However, the disputes between Teck Siang and Madam Chang did not end there and then; they continued. For the next three months very acrimonious correspondence passed between them. On 26 May 1981, Madam Chang's solicitors took out a summons in chambers for an order that the deed of family arrangement be enforced, and the matter came for hearing again before the same Judge in the High Court on 1 June 1981, when he ordered all the parties to perform and fulfil the obligations under the deed of family arrangement. Presumably, thereafter, the parties concerned carried out the terms of the deed of family arrangement, and no quarrel or dispute developed or arose out of the second order. It certainly

appeared that with that order came the end to the disputes between the parties concerned in relation to the estate. Unfortunately, that was only the first chapter; the second chapter commenced about two years later.

On 8 April 1983, Shirley Wang and her daughter, the latter suing by Shirley Wang as next friend, commenced proceedings in Suit No. 1613 of 1983 ("first action") against Teck Siang, Ko Seng Gie, Ko Chuan Seng also known as Ko Hong Kiat, and Oon Soon. The claim against the first 3 defendants is for specific sums of money alleged to be due from them respectively; Oon Soon was joined as a co-administrator to the estate of Oon Kay as he refused to be joined as a plaintiff. The basis of the plaintiffs' claim is this. On diverse dates the testator caused to be incorporated in Singapore the 4 companies, namely: Kah Hin, Ho Chiang, Chin Cheng and Ko Rubber (hereafter collectively called "Singapore Companies"); he also caused to be incorporated in Hong Kong one company called Sun Hing Realty Limited ("Sun Hing"). The shares in the Singapore Companies were during his lifetime held in part by the testator and in part by one or more of the first 3 defendants, namely: Teck Siang, Ko Seng Gie and Ko Chuan Seng, and the shares in Sun Hing were held in part by the testator and in part by other registered shareholders. It was understood between the testator and the shareholders of the companies that all the shares in the Singapore Companies and Sun Hing were to be held by all the shareholders, including the testator, in trust for the testator and his relatives, and immediately prior to the death of the testator, the beneficiaries under such trust were the following persons in the following proportions:

(a) Testator	115/210	shares
(b) 1st defendant	30/210	shares
(c) 2nd defendant	22/210	shares
(d) 3rd defendant	15/210	shares
(e) Ko Teck Djie	20/210	shares
(f) Ko Choon Huat	3/210	shares
(g) Ko Oon Sin	1/210	shares
(h) Ko Oon Hian	1/210	shares
(i) Ko Seng Hock	3/210	shares
	210/210	shares

Consistent with the trusts, the testator by Clause 12 of the will bequeathed all his shares and interest in the Singapore Companies and Sun Hing to the undermentioned persons in the following proportions:

Class A Beneficiaries

(a) Madam Chang	50	shares
(b) Madam Chan Yen Cheng	15	shares
(c) Ko Oon Hin, the testator's son by Madam, Chang	10	shares
(d) Ko Oon Soon	20	shares
(e) Ko Oon Kay (now deceased)	20	shares
	115	shares

Class B Beneficiaries

(a) 1st defendant	30	shares
(b) 2nd defendant	22	shares
(c) 3rd defendant	15	shares

(d) the said Ko Teck Djie	20	shares
(e) the said Ko Choon Huat	3	shares
(f) the said Ko Oon Sin	1	share
(g) the said Ko Oon Hian	1	share
(h) the said Ko Seng Hock	3	shares
	95	shares

By reason of the trusts created and pursuant to Clause 12 of the will, the estate of Oon Kay is entitled to 20/210th of all the shares in the Singapore Companies and Sun Hing.

By an agreement in writing dated 30 June 1981, Teck Siang, Madam Chang, Ko Oon Hin, Ko Seng Gie, Ko Chuan Seng, Madam Tan Chauw Jing, as executrix of the estate of Ko Teck Djie, Shirley Wang and Oon Soon, as administrators of the estate of Oon Kay, Ko Choon Huat, Ko Seng Hock, Ko Oon Sing and Ko Oon Hian, sold to a company, Genting Berhad, all their respective shares in Kah Hing, Chin Cheng and Ko Rubber. The plaintiffs claim that the 3 defendants, namely: Teck Siang, Ko Seng Gie and Ko Chua Seng; received the consideration under this sale agreement for the shares held by them respectively in Kah Hing, Chin Cheng and Ko Rubber in trust, and pursuant to Clause 12 of the will, the plaintiffs are entitled to sums representing their entitlements to those shares. On their computation, the plaintiffs claim each for herself the following: (i) S$6,743,318.27 from the 1st defendant, (ii) S$266,618.35 from the 2nd defendant, and (iii) S$266,618.35 from the 3rd defendant.

As stated above, Oon Soon was the 4th defendant in this action. Subsequently, however, he successfully applied, on the basis of the pleadings then filed, to be struck out. The order striking out Oon Soon was made on 18 July 1983.

Though it was pleaded in the statement of claim in the first action that the shares in Sun Hing were held in trust for the testator and class B beneficiaries, no claim was made in respect of such shares. The claim was made 3 years later in Suit No. 422 of 1986 ("second action"). This action was brought by Shirley Wang alone as the co-administratrix to the estate of Oon Kay against Teck Siang and Madam Chang as the executors and trustees of the estate (i.e., estate of Ko Teck Kin), and against Oon Soon as a co-administrator to the estate of Oon Kay. Her claim is for the entitlement of the estate of Oon Kay to the shares and interest in Sun Hing, and is framed in a slightly convoluted form and is briefly this. It was here pleaded that at the date of his death, the testator was the beneficial owner of all the shares in Sun Hing, namely, 43,792 shares of HK$100 each, and these shares were held as follows:

(a) 24,928 shares by the testator, which shares were subsequently registered in the name of one Lim Sin Wan pursuant to a purported transfer dated 8 April 1966 (the day prior to the death of the testator, and

(b) 18,864 shares by various nominees including Teck Siang and Madam Chang.

After the death of the testator, Sun Hing went into voluntary liquidation, and the amount of capital returned to the shareholders was HK$4,052,458. It was pleaded that the executors of the estate, that is, Teck Siang and Madam Chang, ought to have got in the 43,792 shares in Sun Hing, or alternatively the sum of HK$4,052,458 for distribution to the beneficiaries pursuant to Clause 12 of the will. Accordingly, pursuant to Clause 12 of the will and on the computation as pleaded the estate of Oon Kay was entitled to receive an amount of S$195,858. Shirley Wang as co-administratrix therefore claims for this amount, or alternatively an account of what is due in respect of the shares in Sun Hing.

Further, Shirley Wang also claims that at the date of his death the testator was beneficially entitled to the full benefit of a loan of HK$8,000,000 granted by him to Sun Hing in January 1962 or thereabout. Between 24 August and 4 October 1966, Sun Hing repaid the loan by 10 instalments of various amounts. There were two companies at the time, namely, Eaton company Limited ("Eaton") and Kongma company Limited ("Kongma"), both incorporated in Hong Kong. The shares in Eaton and Kongma were allotted to various persons, and the consideration for such shares was provided for out of the amounts repaid or credited as repaid in respect of the HK$8 million loan. Thereafter, by two assignments dated 14 September 1966 and 28 October 1966, Sun Hing respectively transferred to: (i) Eaton for a consideration of HK$3,310,959.50, 6537/632639th share in a property in Hong Kong called Sun Hing Building, and (ii) Kongma for a consideration of HK$4,427,511, 9635/62639th share in Sun Hing Building. It was pleaded that all the shares in Eaton and Kongma were at all material times held by the registered holders upon trust for class A beneficiaries, the estate of Oon Kay being therefore entitled to a 20/115th share thereof. Subsequently, on 1 May 1974, Eaton and Kongma went into voluntary liquidation, and upon liquidation, large sums of money were paid out of the assets of Eaton and Kongma to Oon Soon and Ko Oon Hin with the knowledge and concurrence of the executors and trustees of the estate, this is, Teck Siang and Madam Chang. By reasons of these matters, Shirley Wang is claiming that Oon Soon became liable to the estate of Oon Kay as the constructive trustee as to 20/115th share of the amounts paid out of the assets of Eaton and Kongma, and that the executors of the estate are liable to account for the 20/115th share of the amounts paid out of the assets of Eaton and Kongma, they having been guilty of wilful default in not getting in on behalf of the estate the amounts paid out.

Probably after the commencement of the second action it was found that the statement of claim (as then amended) in the first action did not cover all the claims which the plaintiffs have or might have against all the necessary parties. Accordingly, on 8 January 1987 an application was made by the plaintiffs in the first action for an order, *inter alia*, that Oon Soon and Madam Chang be added as defendants to the action and that leave be given to re-amend the amended statement of claim. That application was resisted by the 1st defendant and was adjourned to a date to be fixed. At that point of time the plaintiffs became apprehensive that the claims as contemplated in the proposed re-amended statement of claim might be time barred by the time the application is heard, and they therefore took out what they called a protective writ in Suit No. 296 of 1987 ("third action"). In this action the plaintiffs are Shirley Wang and her daughter, the latter suing by Shirley Wang as next friend, and the defendants are Teck Siang, Madam Chang and Oon Soon. The plaintiffs claim against Teck Siang and Madam Chang as executors of the estate for breach of duty, i.e., failure to get in certain assets of the estate, in particular the shares in Singapore Companies and Sun Hing. The plaintiffs claim against Oon Soon as a co-administrator to the estate of Oon Kay for breach of duty, i.e., failure to assert the claims of the estate of Oon Kay. The reliefs sought against Teck Siang and Madam Chang are an enquiry as to the shares in the Singapore Companies and Sun Hing and an account for the shares and the value thereof, and the relief sought against Oon Soon is an order that he take all necessary steps to assert the claims of the estate of Oon Kay as asserted by the plaintiffs or alternatively that he account to the estate of Oon Kay an amount equal to 20/210th of the value of the shares in the Singapore Companies and Sun Hing. Some of the averments in the amended statement of claim in the first action are repeated in the statement of claim in the third action; so were some of the averments in the second action. The reliefs sought and the nature of the claims in the third action are not identical with or the same as those in the first action; and except for Teck

Siang, the parties sued in the third action are not the same as those in the first action. In relation to the second action, insofar as the claims in respect of the shares of Sun Hing are concerned, there are some overlapping in the third action.

To the claims of the plaintiffs in all the three actions there is one common defence or one defence which raises the same issues of fact and law, and it is this: all outstanding matters and disputes in relation to the estate and administration thereof' had been finally settled by the deed of family arrangement dated 2 February 1966 ("the deed") executed by all the parties including Shirley Wang as the co-administratrix to the estate of Oon Kay, and by Clause 13 of the deed, all the beneficiaries (as therein defined including the estate of Oon Kay) had released the executors and trustees of the estate from all actions, proceedings, claims and demands for or on account of the estate, and by Clause 14 thereof all the parties to the deed had confirmed that they had no other claim whatsoever against Teck Siang and Madam Chang in their personal capacities, especially in connection with the estate and the Singapore Companies. This defence was the foundation of the applications made by the defendants concerned to strike out the statements of claim and dismiss the actions against them respectively. This defence rests entirely on the provisions of Clauses 13 and 14 of the deed and it is convenient to set out here these clauses which are as follows:

> 13. In consideration of the premises each of the beneficiaries hereby releases the executor/ executrix and trustees and each of them from all actions proceedings claims and demands for or on account or in respect of the estate and the income and profits thereof and for or on account or in respect of anything done omitted or suffered by the executor/executrix and trustees or either of them in or about the administration of the estate or in anywise relating to the premises whether or not herein expressed or referred to.
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> 14. All parties hereto further confirm that they have no other claim whatsoever against Ko Teck Siang and Chang Jih Hao in their personal capacities especially in connection with the estate or the companies.

The question therefore is whether the claims made by the plaintiffs in these actions fall within the scope of Clauses 13 and 14 of the deed. This question turns on (i) the facts alleged and relied upon by the plaintiffs in support of their claims, and (ii) the true construction of these provisions. On the facts, it was alleged that Shirley Wang herself was not aware of the trusts under which the shares in the Singapore Companies and Sun Hing were held by the registered holders thereof at the time of the execution of the deed. She was not a party to the protracted negotiations that had been conducted which led to the execution of the deed; the negotiations were mainly between Teck Siang and Madam Chang. Shirley Wang was present at one or two meetings including the meeting at which she was asked to execute, and did execute, the deed as the co-administratrix to the estate of Oon Kay. She therefore could not have intended to discharge the executors of the estate or any other party from any claim the estate of Oon Kay has or might have in respect of the trusts - which her Counsel called the secret trusts - of the shares and interests of the testator in the Singapore Companies and Sun Hing held by the registered holders thereof.

It was further alleged by Shirley Wang that the executors of the estate were aware of the secret trusts, and not only did they not disclose to her the secret trusts at or before the execution of the deed but they also made side arrangements to give effect to the secret trusts. The plaintiffs maintained that at or about the time of execution of the deed there were side arrangements made between Madam Chang and Teck Siang and between Madam Chang and other parties whereby Madam Chang had got in her own entitlement to the shares in the Singapore Companies and procured to be got in the entitlement of Ko Oon Hin, the son

of the testator by Madam Chang, to the shares in the Singapore Companies. These side arrangements are evidenced by the following instruments:

(1) Memorandum and declaration of trust dated 2 February 1981 whereby Teck Siang, having expressed his wish to make a gift of the undermentioned shares to Madam Chang and the latter having requested that the shares be transferred to persons named by her therein, 'by way of gift' transferred to Madam Chang as bare trustee the persons therein named:

(i) 114,300 shares in Ko Rubber;

(ii) 32,400 shares in Kah Hin;

(iii) 202,200 shares in Chin Cheng, and

(iv) 7,250 shares in Ho Chiang.

(2) Memorandum and declaration of trust dated 2 February 1981 whereby similarly Ko Seng Gie "by way of gift" transferred to Madam Chang as bare trustee for the persons therein named:

(i) 275,400 shares in Chin Cheng, and

(ii) 2,250 shares in Ho Chiang.

(3) Memorandum and declaration of trust dated 2 February 1981 whereby similarly Ko Hong Kiat "by way of gift" transferred to Madam Chang as bare trustee for the persons therein named 257,400 shares in Chin Cheng.

(4) Memorandum of gift of shares in which Teck Siang declared that he had on 3 February 1981 "by diverse instruments" transferred to Ko Oon Hin:

(i) 57,150 shares in Ko Rubber;

(ii) 8,400 shares in Kah Hin;

(iii) 57,200 shares in Chin Cheng, and

(iv) 2,000 shares in Ho Chiang, and that the shares were so transferred by him "by way of gift".

(5) Memorandum of gift of shares in which Ko Seng Gie declared that he had on 3 February 1981 "by diverse instruments" transferred to Ko Oon Hin:

(i) 57,200 shares in Chin Cheng, and

(ii) 500 shares in Ho Chiang and that the shares were so transferred by him "by way of gift".

(6) Memorandum of gift of shares in which Ko Hong Kiat declared that he had on 3 February 1981 "by diverse instruments" transferred to Ko Oon Hin 57,200 shares and that the shares were so transferred by him "by way of gift".

As can be seen, under these instruments, the various lots of shares in the 3 of the Singapore Companies were expressed to have been transferred to Madam Chang and to her son Ko Oon Hin "by way of gift" art ostensibly there was no reason or explanation why the "donors" named in those instruments should gift those shares to Madam Chang and her son in the way they did.

On these facts as alleged by Shirley Wang, Mr. Sher founded his arguments on the construction of the deed, and, in particular, Clauses 13 and 14 thereof as follows. The release as contained in the deed should not be construed to apply to circumstances of which a party executing it was ignorant at the time. If it turns out that on construction the terms of the release are more extensive than intended, equity will intervene and confine the terms to

that which was intended or contemplated by the parties. In addition, there is here a trustee and beneficiary relationship and there is a duty of disclosure by the trustees, and Teck Siang and Madam Chang as executors and trustees of the estate in breach of such duty had never made any disclosure to Shirley Wang of the secret trusts of the shares in the Singapore Companies and Sun Hing.

In support, Mr. Sher relied on *Lyall & Anor. v. Edwards an Matthie* 6 H & N 336 (158 ER 139), *Turner v. Turner* [1880] 14 Ch D 829 and *Grant v. John Grant & Sons Pty. Ltd.* [1964] The Argus LR 517. In *Lyall & Anor. v. Edwards and Matthie*, to a claim in trover for (i) 22 warrants for 22 chests of indigo, and (ii) 22 chests of indigo, the defendants pleaded that the plaintiffs had by deed released them. The release contained in the deed was drafted in very wide terms and released the defendants "from all and all manner of actions, cause of action and suits, bills, bonds, writings, obligations, debts, etc. claims and demands whatsoever both at law and in equity, or otherwise howsoever". To that plea the plaintiffs replied that at the time the plaintiffs executed the release they did not know that they had any claim against the defendants in respect of the warrants and the chests of indigo and that the deed was intended to release the defendants from debts due to the plaintiffs. It was held that the replication was good. The Court was unanimous in holding that the deed did not release the claim in trover. Pollock CB said at p. 347:

> We are all of opinion that the replication is good and the rejoinder bad. It is a principle long sanctioned in Courts of equity, that a release cannot apply, or be intended to apply to circumstances of which a party had no knowledge at the time he executed it, and that if it is so general in its terms as to include matters never contemplated, the party will be entitled to relief. Here the replication sets out sufficient to show that the plaintiffs are not bound by the release of the circumstances mentioned; and the defendants fail to establish any answer by the rejoinder. There will therefore be judgment for the plaintiffs.

Martin B. said at pp. 347-348:

> I am also of opinion that the replication is good and the rejoinder bad. The replication is founded on the equitable doctrine that if a release is given for a particular purpose, and it is understood by the parties that its operation is to be limited to that purpose, but it turns out that the terms of the release are more extensive than was intended, a Court of equity will interfere and confine it to that which was in the contemplation of the parties at the time it was executed. The case of *Farewell v. Cocker* (2 Meriv. 171), which has been referred to, is an authority for that position. Here we are required to call in aid the rule in equity. The substance of the replication is, that the act of conversion committed by the defendants was not within the meaning of the release ... It seems to me that the facts stated in the replication show that the release was only intended to apply to such claims as ordinary debts, and not to a cause of action for a conversion.

Similar pronouncement was made by Wilde B; he said at p. 348:

> I am of the same opinion. The doctrine of a Court of equity is, that a release shall not be construed as applying to something of which the party executing it was ignorant, and we have now to act on that doctrine in a Court of law.

In *Turner v. Turner* a release was given to an executrix in consideration of certain payments made and it released her from all claims on the estate. It was afterwards discovered that the property in which the testator was entitled to a share had, during his lifetime, been sold at an undervalue.The executrix instituted proceedings and recovered a substantial sum of money as part of the estate. It was held that the money was not included in the release. Malins V.C. said, at pp. 833-834:

> It is to my mind impossible to read this deed without seeing that it is addressed to the state of things and to the amount of property of which the parties were aware, and that it has no application and could have no application to property of the existence of which they were unaware. It is an arrangement with regard to a state of things then known; but as to these engravings, and the setting aside of the sale, it was impossible that it could apply to them. In a case of this kind it is the duty of the Court to construe the instrument according to the knowledge of the parties at the time, and according to what they intended, and not to extend it to property which was not intended to be comprised within it. There is no intention expressed to assign to the widow any property which might afterwards accrue to the testator's estate, or property which was not known. So far from that being the case, it is clear that the deed was only intended to apply to property the existence of which they were then aware of. I quite agree with the assertion made by Mr. Woods and other of the learned Counsel that the words of release are in themselves abundantly sufficient, and if the deed is to be read literally and to be considered as including everything which they had known or might hereafter know, it is quite clear that this suit is barred by that release. But it has always been the rule of this Court to construe releases and documents of that kind with regard to the intention of the parties, and to refer in such cases to the state of the property which was known at the time.

The Australian case of *Grant* similarly lays down the same principle. There, two branches of a family had by a deed compromised the disputes between them. The terms of the release were:

> ... Each of the parties hereto hereby releases the other and others of them from all sums of money and accounts and civil actions proceedings claims and demands whatsoever which any of them at any time had or has at or prior to the completion against the other for or by reason or in respect of any act cause matter or thing and without limiting the generality thereof the H.C. Grant family releases the defendants in the hereinbefore recited litigation from all costs in respect of the said litigation.

A company thereafter sued one member of a branch of the family for a debt and the defendant pleaded the release. To that plea the plaintiff replied on equitable grounds that at the time of the release it was unaware of the moneys claimed and did not intend to release such a claim and was unaware of any intention on the part of the defendant that it should be released. It was held by the High Court of Australia that on the basis of the facts alleged in the replication the release could not in equity extend to the claim of the plaintiff. The Court, after referring to the various authorities, said at pp. 524-525:

> From the authorities which have already been cited it will be seen that equity proceeded upon the principle that a releasee must not use the general words of a release as a means of escaping the fulfillment of obligations falling outside the true purpose of the transaction as ascertained from the nature of the instrument and the surrounding circumstances including the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and the actual intention of the releasor.
>
> The facts stated in the third replication if true would show that the plaintiff company did not know of the defendant's liability it now seeks to enforce, did not intend to release it as part of, the transaction and did not know of any intention on the part of the defendant that it should be released. The allegation that the defendant knew of the obligation but did not inform the plaintiff company may be introduced as bearing upon the un-conscientiousness of the defendant's reliance upon the general words of the release, but it does not seem to be essential to the application of the governing principle of equity. Doubtless it was not meant as an allegation of non-disclosure where a duty of disclosure existed. It is not the avoidance of the transaction for non-disclosure that the plaintiff wants, but the limitation of the operation of the general words so as to exclude the causes of action sued upon.

In addition, other authorities have been cited by Mr. Sher, such as *Ramsden v. Hylton* 2 Ves. Sen. 304 (28 ER 196), *Lindo v. Lindo 1 Beav.* 496 (48 ER 1032), *Payler & Ors. v. Homersham* 4 M & S 423 (105 ER 890), *Cole v. Gibson* 1 Ves. Sen. 504 (27 ER 1169), and they all adumbrated the same principles.

I can see the force of Mr. Sher's arguments, and his main thrust is this: the subject matters of the claims in the three actions are not covered by the deed on the basis of the facts alleged and on the true construction of the deed as contended. The plaintiffs are not claiming the entitlement of the estate of Oon Kay to the shares in the Singapore Companies held by the testator at the date of his death. Those shares, they accept, had been got in and distributed pursuant to Clause 12 of the will. What they are claiming is the entitlement of the estate of Oon Kay (and they each claim one half of such entitlement) to the shares in the Singapore Companies held by Teck Siang, Ko Seng Gie and Ko Chuan Seng - the three defendants in the first action. The plaintiffs say that these persons held, the shares in trust for the testator and pursuant to Clause 12 of the will the estate of Oon Kay is entitled to 20/210th share thereof and they, the plaintiffs, are the sole beneficiaries of the estate of Oon Kay and are each entitled half of such entitlement. In the first action they make a direct claim a money claim - against the 3 trustees. In the third action they claim against the executors of the estate for breach of duty in failing to get in these assets; this is an alternative claim. Similarly, Shirley Wang, as the co-administratrix to the estate of Oon Kay, claims an entitlement of the shares in Sun Hing and also of the benefit of the loan of HK$8 million granted by the testator to Sun Hing, and she claims against Teck Siang and Madam Chang as-executors of the estate for failing to get in the shares in Sun Hing and the benefit of the loan granted to Sun Hing. In addition, in respect of the benefit of the loan she also claims against Oon Soon as a constructive trustee, as he was one of the recipients of the capital repayments made upon the liquidation of Eaton and Kongma.

To decide whether these claims fall within or outside the scope of the releases contained in Clauses 13 and 14 of the deed, the Court will have to examine and consider Shirley Wang's allegations and the counter allegations by Teck Siang, Madam Chiang, Oon Soon and others and evidence in support, thereof respectively, and in particular: (i) the state of knowledge of Shirley Wang at the time of the execution of the deed; (ii) any evidence adduced by her in establishing the secret trusts of the shares in the Singapore Companies and Sun Hing, and the benefit of the loan to Sun Hing; (iii) the consideration provided for the shares in the Singapore Companies and Sun Hing, and who provided them; (iv) the consideration for the shares in Eaton and Kongma; (v) the capital repayments made to Oon Soon and Ko Oon Hin on the liquidation of Eaton and Kongma and the reasons for such repayment, (vi) the reasons and purposes of and the circumstances relating to the execution of the 3 memoranda and declarations of trusts in favour of Madam Chang and the 3 memoranda of gifts of shares in favour of Ko Oon Hin, and (vii) whether these instruments were known to or disclosed to Shirley Wang at the material time. If the matters as alleged by Shirley Wang are determined in her favour the Court will then have to consider whether the subject matters of her claims fall within the scope of the release, and that is a matter of construction, which will turn on the provisions of the deed and the factual matrix in which the parties were at the material time. These again require careful consideration. At this stage it is not necessary for me to express a definitive view that if what Shirley Wang alleged is true, her claim would fall outside the scope of the release contained in Clauses 13 and 14 of the deed. All I can say, and need to say, is that if what she alleged is true there is a strong case for arguing that on equitable grounds her claims would not be barred by those provisions. As to whether she would make good her claim is a matter of evidence and is also a matter of construction of the deed and in particular, Clauses 13 and 14 thereof.

Mr. Price for Teck Siang submitted that on the true construction of the deed all the disputes between the parties thereto, including the claims in these actions, had been finally settled, and relied on various provisions thereof in support. In his submission there is no doubt whatsoever that:

(i) everyone concerned in the deed agreed precisely what shares in the Singapore Companies belonged to the estate;

(ii) everyone confirmed the accounts of the estate, and

(iii) everyone agreed on what was to be done thereunder.

In effect, he contended that the provisions of the deed barred the claims brought by the plaintiffs and relied on Clauses 13 and 14 of the deed.

The sheet anchor of his arguments on this point is the decision of Oliver J (as he then was) in *Nautamix B.V. v. Jenkins of Retford Limited* [1975] FSR 385. In that case, a former employee of the plaintiffs divulged confidential information to the defendants on the basis of which the latter applied for a patent. In the application the defendants falsely stated the name of the inventor, and eventually the patent was granted. The plaintiffs applied for it to be revoked, and subsequently a compromise was reached and a deed was executed. The terms of the deed contained, *inter alia*, a provision that "all actions, claims or causes of action which the parties may at the date hereof have against one another (whether disclosed or not) shall be regarded as fully and finally settled on the terms of this deed." After the execution of the deed the plaintiffs discovered the disclosure of the confidential information and the false claim of inventorship of the patent. They then brought an action to set aside the compromise on the ground of fraudulent misrepresentation, and even if the compromise could not be set aside they claimed that they were entitled to damages for breach of confidence in respect of each fresh manufacture since its date. The defendants applied to strike out the statement of claim relying on the terms of the settlement. The application was allowed by Oliver J holding, *inter alia*, that the terms of settlement precluded the plaintiffs from bringing the action. He said, at p. 398:

> But where the parties are in litigation, and upon a compromise each clearly contemplates that there may be other causes of action which he does not know about (which would include a cause of action, for instance, in deceit) it is a little difficult for either of them to say afterwards that he is induced to enter into the agreement by fraud when his own contemplation is that he may have such a claim and is nevertheless content to bargain to close his eyes to it.

Against that decision the plaintiffs appealed and before the Court of Appeal an application was made to re-amend the amended statement of claim by adding a paragraph which set out the misrepresentation made to the patent office and alleged that the misrepresentation was intended to be and was of a continuing character, and further by adding an entirely distinct and separate misrepresentation alleged to have been made at the time of the negotiation of the compromise. On the basis of the re-amendments, which were allowed, the Court of Appeal held that it was at least arguable that the re-amended statement of claim disclosed a good cause of action founded on the original misrepresentation in the patent application as well as a new and distinct misrepresentation at the time of negotiation leading to the compromise, and allowed the appeal. It seems to me clear that on the basis on which the Court of Appeal allowed the appeal that part of the judgment of Oliver J quoted above and relied upon by Mr. Price cannot really stand, though the Court of Appeal did not expressly disapprove it. As Mr. Sher submitted, it was in effect overruled by the Court of Appeal. At any rate the

factual situation envisaged in that passage of the judgment is a far cry from what was alleged in these actions. The fight in 1979 and particularly in all those proceedings then instituted was essentially between Teck Siang and Madam Chang, and the estate of Oon Kay was joined as a party only in OS 359 of 1979 which involved a question of construction of Clauses 12 and 13 of the will, and presumably the negotiations that led to the execution of the deed were also essentially between the two of them. It is difficult at this stage to say that Shirley Wang, who signed the deed, at that time contemplated that there might be other causes of action which she did not know about and was "content to bargain to close (her) eyes" to those causes of action. Lastly, there is nothing in Clauses 13 or 14 of the deed to suggest that it covers all actions claims or causes of action "whether disclosed or not". In my view, Nautamix does not assist the case of the defendants.

Next, Mr. Price argued that there was no room for setting aside the deed as it was embodied in the order and that a new action is necessary to overthrow such an order. This argument is totally misconceived. Shirley Wang is not attacking the deed or the order. It is not the case of Shirley Wang that the deed or the order should be set aside or overthrown. Her case is simply that the subject matters of the claims are not within the scope of the deed.

Mr. Price placed great emphasis on the fact that the deed was incorporated in the order made on 3 February 1981 and that was a final order. I do not see how this point can be disputed. But it seems to me that the incorporation of the deed in the order is not of any consequence in relation to the case of the plaintiffs; the crux of their case is that the subject matters of their claims fall outside the scope of the release contained in the deed, and if the deed did not release the claims, the order did not make it do so. Mr. Sher drew my attention to a passage of the judgment of Malins V.C. in *Turner v. Turner* (*supra*), which I find of some assistance. In the course of his judgment the learned Judge referred to a case, *Syer v. Gladstone*, decided by him, in which a release of a partner of a firm was embodied in a Court order whereby that partner was released and discharged from all claims and demands from his partners which was a complete bar to any claim up to the date of that order. Thereafter, it was discovered that at that time the firm had sustained a huge loss it was argued that the order was an absolute bar to the claim in respect of the loss, and on the construction of this order Malins V.C. said, at p. 836:

> ... But I put a construction upon it to the effect that it was an order according to the state of knowledge of the parties, that they were in ignorance of this circumstance, and that if they had known of it a larger sum would have had to be paid, and therefore in that case I held that Mr. Bell's estate must contribute to the loss notwithstanding that he had obtained this release.

Mr. Price then sought to show by referring to various documents that Shirley Wang had notice of the shares in the Singapore Companies and Sun Hing and the secret trusts, if not before the execution of the deed, certainly soon thereafter, and she had ample opportunity of challenging the deed and the order when the parties went before the Court on 1 June 1981, and the Court made a further order directing all parties to perform the deed. Mr. Price relied, amongst other things, on the following:

(i) Ko Ai Teen's letter of 25 April 1981 written to Teck Siang and Madam Chang, a copy of which was sent to Shirley Wang, in which reference was made to secret trusts and the shares in Sun Hing and distribution of moneys on liquidation of Sun Hing,

(ii) Letter of 26 May 1981 from Messrs. Chung & Co written to Oon Soon, a copy of which was also sent to Shirley Wang, where Chung & Co. also made reference to secret trusts;

(iii) Affidavit of Tan Geok Ser affirmed on 26 May 1981 which was filed in support of the application to Court for an order that all parties be directed to perform the deed in which were exhibited copies of the memoranda and declarations of trust which I have referred.

At that time Shirley Wang, Mr. Price submitted, knew of the secret trusts and the matters in dispute and she was put on enquiry. She was represented by Counsel at the hearing and could have raised these matters which she did not. She had lost that opportunity and cannot now raise them. To that Mr. Sher's reply is simply this. The deed at that time had been executed and it was valid, and Shirley Wang was bound by it. Shirley Wang is not attacking the deed in these proceedings. She is claiming the entitlement of Oon Kay due under the secret trusts under which the shares in the Singapore Companies and Sun Hing were held by the registered holders thereof. The question is therefore whether these claims are covered by the deed or not. Shirley Wang says that they are not covered, and this she intends to show at the trial.

Mr. Tay on behalf of Madam Chang, in addition to associating himself with the arguments advanced by Mr. Price, sought to rebut the allegations of secret trusts made by Shirley Wang by delving on allegation of facts contained in the numerous lengthy affidavits filed. Like Mr. Price, he submitted that Shirley Wang had ample opportunity of raising queries as to the disputes referred to in the deed and of raising the secret trusts (if there were such trusts) before she executed the deed but she did not do so. However, it is not appropriate, nor is it possible, at this stage to conduct a minute examination of the voluminous affidavits filed and arrive at the conclusion contended by Mr. Tay. What Madam Chang and others alleged in the various lengthy affidavits are obviously matters for investigation at the trial.

Mr. Tay also submitted that there was duplicity in the statements of claim in the second action and the third action. On this he is partly correct. In the second action the statement of claim is one solely relating to the shares in Sun Hing and the benefit of the HK$8 million loan. The claim in relation to those shares was briefly repeated in the statement of claim in the third action. However, such duplicity of claims does not warrant a striking out of the entire statement of claim in the third action; it may warrant a striking out of that part of the claim relating to Sun Hing shares, but that is not before me.

I find Mr. Sher's arguments extremely compelling, and Mr. Price has not really met or answered them. Nor has Mr. Tay. In my opinion, for the reasons I have given, none of the statements of claims in the three actions are obvious cases for striking out. On the material before me, I certainly cannot say that they disclose no reasonable cause of action or that the claims are frivolous or vexatious or amount to an abuse of process of the Court. In conclusion, in this particular case, on the basis of the matters raised and discussed, I respectfully adopt what Danckwerts LJ said in *Wenlock v. Moloney & Ors.* [1965] 2 All ER 871:

> ... There is no doubt that the inherent power of the Court (to strike out a statement of claim) remains; but this summary jurisdiction of the Court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial Judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the Court and not a proper exercise of that power.

In the result, I allow the following appeals: the two appeals by the plaintiffs against the two orders respectively of the Assistant Registrar made on 26 January 1988 in Suit No. 422 of 1986 and the three appeals by the plaintiffs against the three orders respectively of the Assistant Registrar made also on 26 January 1988 in Suit No. 296 of 1987, with costs here and below to be paid by the defendants concerned in any event. Accordingly, the five orders of the Assistant Registrar are set aside and the five applications before him are dismissed. The appeal by the 1st defendant against the order of the Assistant Registrar made on 24 August 1988 is dismissed with costs to be paid by the 1st defendant in any event.

Also found at [1989] 2 CLJ 694